101

(2)

No. 07-1582

Supreme Court, U.S.
FILED
AUG 20 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRAZIER JELKE, III, DECEASED, WACHOVIA BANK, N.A., F/K/A FIRST UNION NATIONAL BANK, PERSONAL REPRESENTATIVE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JEFFREY A. LAMKEN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

JOHN W. PORTER
Counsel of Record
AARON M. STREETT
AMY PHARR HEFLEY
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002-4995
(713) 229-1234

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether selection of the methodology for valuing the built-in capital gains tax liability of a closely-held corporation for purposes of the estate tax is a question of law, to be reviewed *de novo*.

2. Whether the court of appeals correctly held that, when a closely-held company's fair market value for estate tax purposes is determined based on its net asset value, there must be a dollar-for-dollar discount for built-in capital gains tax liability.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Estate of Frazier Jelke, III, Deceased, Wachovia Bank, N.A., f/k/a First Union National Bank, Personal Representative states the following:

The parent company of respondent Wachovia Bank, N.A., is Wachovia Corporation. No other publicly held company owns 10 percent or more of respondent's stock. In September 2001, First Union Corporation (the parent company of First Union National Bank) merged with Wachovia Corporation to form a new entity known as Wachovia Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Preliminary Statement	1
Statement	2
I. Background	2
II. Proceedings Below	4
A. The Tax Court's Ruling	4
B. Proceedings In The Court Of Appeals	6
Reasons For Denying the Petition	7
I. The Decision Below Neither Conflicts With Nor Should Be Vacated And Remanded For Reconsideration In Light Of This Court's Decision In *CSX*	8
A. *CSX*'s Interpretation Of The Railroad Revitalization And Regulatory Reform Act Has No Bearing On The Standard Of Review For The Tax Court's Choice of Valuation Methods	9
B. This Court Should Not Remand To The Court Of Appeals For Reconsideration In Light Of Contentions It Has Considered And Rejected	13
II. The Petition Does Not Present An Important Legal Issue On Which There Is Conflicting Authority	14
A. There Is No Conflict On Whether The Methodology For Valuing Estate Assets Is A Question Of Law Or Fact	15

TABLE OF CONTENTS—Continued

Page

B. The Courts Of Appeals Agree That Capital Gains Taxes On An Estate's Stock In A Closely-Held Corporation Must Be Discounted Dollar-For-Dollar On The Date Of Death 24

Conclusion 27

TABLE OF AUTHORITIES

Page

CASES

Amerada Hess Corp. v. *Commissioner*, 517 F.2d 75 (3d Cir. 1975) 16

Becker v. *United States*, 986 F.2d 691 (8th Cir. 1992) 17

CSX Transportation, Inc. v. *Georgia State Board of Equalization*, 128 S. Ct. 467 (2007) ..... *passim*

Collins v. *Commissioner*, 216 F.2d 519 (1st Cir. 1954) 9, 17

Eisenberg v. *Commissioner*, 155 F.3d 50 (2d Cir. 1998) 25

Estate of Dunn v. *Commissioner*, 301 F.3d 339 (5th Cir. 2002) ..... *passim*

Estate of Godley v. *Commissioner*, 286 F.3d 210 (4th Cir. 2002) 18, 20

Estate of Holl v. *Commissioner*, 54 F.3d 648 (10th Cir. 1995) 22

Estate of Jameson v. *Commissioner*, 267 F.3d 366 (5th Cir. 2001) 24

Estate of Welch v. *Commissioner*, No. 98-2007, 2000 WL 263309 (6th Cir. Mar. 1, 2000) (208 F.3d 213 (Table)) 25, 26

Gross v. *Commissioner*, 272 F.3d 333 (6th Cir. 2001) 19, 20

Heyen v. *United States*, 945 F.2d 359 (10th Cir. 1991) 22

Krapf v. *United States*, 977 F. 2d 1454 (Fed. Cir. 1992) 16

TABLE OF AUTHORITIES—Continued

Page

McMurray v. *Commissioner*, 985 F.2d 36 (1st Cir. 1993) 17

National Cable & Telecommunications Ass'n v. *Brand X Internet Services*, 545 U.S. 967 (2005) 26

Palmer v. *Commissioner*, 523 F.2d 1308 (8th Cir. 1975) 17

Powers v. *Commissioner*, 312 U.S. 259 (1941) ..... *passim*

Saltzman v. *Commissioner*, 131 F.3d 87 (2d Cir. 1997) 21

Sammons v. *Commissioner*, 838 F.2d 330 (9th Cir. 1988) 17, 18, 20

Silverman v. *Commissioner*, 538 F.2d 927 (2d Cir. 1976) 21

Van Zelst v. *Commissioner*, 100 F.3d 1259 (7th Cir. 1996) 22

STATUTES AND REGULATORY MATERIALS

26 U.S.C. §§ 2031(a), 2033 2

26 C.F.R. § 20.2031-1(b) 2, 27

Rev. Rul. 59-60, 1959-1 C.B. 237 § 5(b) 3

IN THE

Supreme Court of the United States

NO. 07-1582

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

ESTATE OF FRAZIER JELKE, III, DECEASED, WACHOVIA BANK, N.A., F/K/A FIRST UNION NATIONAL BANK, PERSONAL REPRESENTATIVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

This case concerns the standard governing review of the method for valuing a closely-held corporation for purposes of estate-tax law. The Commissioner asks this Court either to grant the petition, vacate the decision below, and remand it for reconsideration in light of this Court's recent decision in *CSX Transportation, Inc.* v. *Georgia State Board of Equalization*, 128 S. Ct. 467 (2007) ("*CSX*"), or to grant the petition and review the decision on the merits. Neither course is appropriate. *CSX* does not speak to the issue in this case and the Eleventh Circuit already declined to reconsider its decision

when the Commissioner raised *CSX* in its request for rehearing. There is no reason for this Court to vacate the judgment and remand the decision for reconsideration in light of a decision the Eleventh Circuit has already considered. Nor is review on the merits warranted. The decision below does not conflict with any Treasury Regulations. It does not conflict with the decision of any other courts of appeals. It is not a suitable vehicle. And review of the questions presented would be premature. Accordingly, the petition should be denied.

STATEMENT

I. BACKGROUND

This case arises from the valuation of the estate of Frazier Jelke, III, upon his death. The Internal Revenue Code provides that, for purposes of calculating the estate tax, the value of a decedent's gross estate shall be determined by including the value of all his property at the time of his death. 26 U.S.C. §§ 2031(a), 2033. The applicable Treasury Regulation provides that the "value" of a decedent's property is its "fair market value." Treas. Reg. § 20.2031-1(b). "Fair market value," in turn, is "the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts," taking into account "[a]ll relevant facts and elements of value as of the applicable valuation date." *Ibid.*

For securities and publicly traded stocks, market value is easily determined. Generally, it will be the published price of the relevant stocks on a public exchange on the date of the decedent's death. For closely-held companies whose stocks are not publicly traded, one must look to Revenue Ruling 59-60. Ruling 59-60 provides that, absent a recent arms-length transaction in the relevant stock, "[t]he value of the stock of a closely held

investment or real estate holding company, whether or not family owned, is closely related to the value of the assets underlying the stock." Rev. Rul. 59-60, 1959-1 C.B. 237 § 5(b). The net-asset-value method of valuation, used by the courts in this case, is based upon the premise that a company has a value equal to the price at which its underlying assets could be sold on the valuation date, less liabilities. See Shannon P. Pratt *et al.*, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 306-307, 308-310 (4th ed. 2000). The net-asset-value method thus provides a snapshot of the company's fair market value on the date of valuation.

Frazier Jelke, III, died on March 14, 1999. Pet. App. 3a. At his death, Jelke owned 6.44% of the total outstanding shares of Commercial Chemical Company ("CCC"), a chemical manufacturing company formed in 1922. *Id.* at 4a, 49a. In 1974, CCC sold its chemical manufacturing business, and its only activity since that time has been to hold and manage investments for its shareholders. *Id.* at 49a. CCC is closely held (through trusts) by Jelke family members. *Ibid.* On Jelke's death, his 6.44% interest in CCC became part of his estate, which is the respondent in this case.

CCC is taxed as a C corporation, and its earnings and capital gains are taxed at the corporate level. CCC's primary investment objective has been long-term capital growth, resulting in low asset turnover. Pet. App. 51a. Because of that low rate of turnover in assets, CCC had large unrealized capital gains. *Ibid.* On the date of Jelke's death, the gross value of CCC's assets was about $190 million, approximately $178 million of which was in marketable securities. *Id.* at 3a, 51a. But many stocks in CCC's portfolio had appreciated in value over time and, once sold, would trigger a relatively large tax liability on the increase in value. As a result, if CCC's securities portfolio had been sold at Jelke's death, it would have

produced a corporate-level capital gains tax liability of more than $51.6 million. *Id.* at 3a, 52a.

When Jelke's estate filed its federal tax return, it valued his 6.44% interest in CCC at $4,588,155. Pet. App. 4a, 52a. The estate calculated that figure by subtracting $53.8 million in corporate liabilities, which included the company's $51.6 million built-in capital gains tax liability, from CCC's $190 million in gross assets. *Ibid.* The estate then applied a 20% discount for lack of control and a 35% discount for lack of marketability. *Ibid.*

The Commissioner disagreed with the estate's calculations and issued a notice of deficiency. Pet. App. 4a, 52a-53a. In the notice, the Commissioner ruled that the value of Jelke's 6.44% interest in CCC was $9,111,000, creating an estate tax deficiency of $2,565,772. *Id.* at 4a, 53a. The Commissioner's valuation included no discount for the company's built-in capital gains tax liability. *Id.* at 4a. It included, however, what the Commissioner described as "reasonable" discounts for lack of control and lack of marketability. *Id.* at 4a, 53a.

II. PROCEEDINGS BELOW

A. The Tax Court's Ruling

The estate contested the Commissioner's valuation of Jelke's 6.44% interest in CCC in Tax Court. The estate argued that the Commissioner's valuation was erroneous because it failed to account for the company's built-in capital gains tax liability. Pet. App. 56a. The estate contended that the fair market value of CCC's assets should be reduced by the full amount of the company's built-in capital gains tax liability on the date of Jelke's death. *Id.* at 56a-57a. The estate also contended that the Commissioner applied unreasonably small discounts for lack of control and lack of marketability. *Id.* at 71a, 78a.

After surveying the legal history of the effect of built-in capital gains tax liability, Pet. App. 57a-62a, the Tax

Court agreed that the estate was entitled to some discount for CCC's built-in tax liability, accepting the Commissioner's concession that he had erred in failing to grant one, *id.* at 57a & n.5. The Tax Court, however, disagreed that a dollar-for-dollar discount for the tax liability was required. The Tax Court postulated that the liquidation of CCC was unlikely to occur on the valuation date and that, as a result, the company's built-in capital gains tax liability would be paid over time. *Id.* at 65a-66a. The Tax Court held that "neither the circumstances of this case nor the theory or method used to value the minority interest in CCC requires an assumption of complete liquidation on the valuation date." *Id.* at 67a. The Tax Court thus refused to base valuation on the net amount the corporation would earn by selling its assets in an arms-length transaction on the date of valuation.

Instead, the Tax Court held that CCC's built-in capital gains tax liability should be reduced to present value, as computed on an annualized, indexed basis over the period in which it was likely to be incurred as CCC's assets naturally turned over through trading and other events. Pet. App. 68a-71a. The Tax Court's analysis assumed that CCC's stock would be sold over a 16-year period; that during that 16-year period, CCC's stock portfolio would not grow at all; that no other liabilities would arise during the 16-year turnover period; and that the tax liability should be discounted back to present value using a 13.2% discount rate. *Id.* at 71a. Using that approach, the Tax Court determined that, for purposes of calculating the company's net asset value, the estate was entitled to a discount of only $21 million of CCC's $51.6 million built-in capital gains tax liability. *Ibid.* After applying 10% and 15% discounts for lack of control and lack of marketability, respectively, the Tax Court valued Jelke's 6.44% interest in CCC stock at $8,254,696, result-

ing in a net deficiency in estate tax of $1 million. *Id.* at 78a, 83a.

B. Proceedings in the Court of Appeals

1. The Court of Appeals for the Eleventh Circuit vacated the Tax Court's judgment and remanded the case. Pet. App. 1a-33a. Reciting the applicable standard of review, the court stated that the Tax Court's legal determinations are reviewed *de novo* and its "findings of fact are reviewed for clear error." *Id.* at 6a. The court of appeals expressly recognized that "valuation" is a "question of fact." See *id.* at 7a ("a question of fact, such as valuation"). Where the resolution of such a factual question rests on "legal conclusions," the court of appeals observed, courts "review those underlying legal conclusions *de novo*." *Ibid.* The question of market valuation at issue in this case, the court stated, includes questions of both fact and law. Any "factual premises are subject to a clearly erroneous standard" while "'the appropriate valuation method is an issue of law that we review *de novo*.'" *Ibid.* (quoting *Estate of Dunn* v. *Comm'r*, 301 F.3d 339, 348 (5th Cir. 2002)).

The court of appeals then surveyed the Tax Code, Treasury Regulations, and relevant case law concerning the proper method of valuing built-in capital gains liability, much as the Tax Court had done before it. Pet. App. 7a-26a. Unlike the Tax Court, however, the court of appeals found no reason to reject the principle that, when determining a closely-held company's net asset value on the date of the decedent's death, the valuation should account for the full amount of unrealized tax liabilities that would be triggered by a sale. Relying on the Fifth Circuit's analysis in *Estate of Dunn* v. *Commissioner*, 301 F.3d 339 (5th Cir. 2002)—the first decision "to emerge with a precise valuation approach as to the amount of the reduction and how to calculate it"—the court of appeals held that "[t]he estate tax owed is calcu-

lated based upon a 'snap shot of valuation' frozen on the date of Jelke's death, taking into account only those facts known on that date." Pet. App. 30a, 31a. Included among those facts was CCC's built-in capital gains tax liability of $51.6 million. *Id.* at 32a. "It is more logical and appropriate," the court of appeals stated, "to value the shares of CCC stock on the date of death" based on how much they would sell for at that time, "without resort to present values or prophesies." *Id.* at 31a.

Judge Carnes dissented. Pet. App. 33a. He did not challenge the standard of review applied by the majority. Nor did he dispute that the Tax Court's selection of a valuation method is an issue of law subject to *de novo* review. Instead, he took issue with the majority's selection of methodologies. Judge Carnes expressed his view that the Tax Court's approach is a superior valuation method because "it more closely reflects the economic interests of those who control the company" and, consequently, "produces a more accurate" valuation than the approach applied by the majority. *Id.* at 38a.

2. About one month after the court of appeals issued its decision, this Court decided *CSX Transportation, Inc.* v. *Georgia State Board of Equalization*, 128 S. Ct. 467 (2007). The Commissioner then filed a timely petition for rehearing, urging (among other things) that *CSX* required the court of appeals to reconsider its holding that choice of valuation method is an issue of law. C.A. Rehearing Pet. 1, 4-6. The court of appeals denied rehearing and rehearing en banc, without recorded dissent. Pet. App. 85a. This petition followed.

REASONS FOR DENYING THE PETITION

The court of appeals' decision in this case is consistent with the decisions of this Court and decisions of other courts of appeals. Although the Commissioner asks this Court to vacate the judgment below and remand for

reconsideration in light of *CSX Transportation, Inc.* v. *Georgia State Board of Equalization*, 128 S. Ct. 467 (2007), the Commissioner asked the court of appeals to reconsider its decision in light of *CSX* already in a timely petition for rehearing. The court of appeals denied that petition without recorded dissent. The Commissioner offers no reason why this Court should ask the court of appeals to re-reconsider in light of that case once again.

In any event, *CSX* has no bearing on the standard of review applicable to the choice of valuation methodologies for federal taxes. Nor does it purport to disturb the decisions of this Court and the courts of appeals uniformly holding that choice of valuation methodology for purposes of calculating taxes is a question of law reviewable *de novo*, while questions surrounding the underlying facts are subject to review for clear error. Finally, the Commissioner does not even assert that the courts of appeals are divided on the second question presented, which is the proper method for calculating the discount for unrealized capital gains tax liability when valuing Subchapter C corporation stock under a net-asset-value approach. To the extent the Commissioner wishes to alter the uniform view of the courts of appeals, there are ample regulatory means at the government's disposal. Review by this Court is thus both unwarranted and premature.

I. THE DECISION BELOW NEITHER CONFLICTS WITH NOR SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *CSX*

This Court has held that "[t]he question of what criterion should be employed for determining * * * value" is "a question of law." *Powers* v. *Comm'r*, 312 U.S. 259, 260 (1941). The court of appeals properly applied that ruling here, holding that the Tax Court's selection of the valuation method for capital gains tax liability on an estate is

an issue of law to be reviewed *de novo*. Pet. App. 6a-7a. The Commissioner nonetheless urges that this Court's decision in *CSX* mandates the opposite result. According to the Commissioner, *CSX* makes the choice of valuation methodologies a question of fact reviewable only for clear error. The Commissioner therefore asks this Court to grant the petition, vacate the judgment below, and remand the case for reconsideration in light of *CSX*. The court of appeals, however, has already had a chance to reconsider in light of *CSX*. And neither *CSX*'s holding nor its reasoning supports the Commissioner's request.

A. *CSX*'s Interpretation of the Railroad Revitalization and Regulatory Reform Act Has No Bearing on the Standard of Review for the Tax Court's Choice of Valuation Methods

This Court and the courts of appeals have long agreed that market value is ultimately a question of fact. Consistent with this Court's decision in *Powers*, *supra*, however, courts have long held that resolution of that factual question may require resolution of underlying questions of law, such as the propriety of a particular methodology. Those underlying legal questions are reviewed *de novo*. As the First Circuit observed nearly half a century ago, while "[t]he question of fair market value for tax purposes is ever one of fact," a court asked "to determine whether the finding of value is clearly erroneous" often will have to "examine the criterion which was employed by the Tax Court in arriving at its determination of value, [and] what is the proper criterion is a question of law." *Collins* v. *Comm'r*, 216 F.2d 519, 522 (1st Cir. 1954); see pp. 16-23, *infra*. Consistent with that well-established framework, the decision below states that the ultimate question of "valuation" is "a question of fact." Pet. App. 7a. Likewise, it holds that, where "a question of fact, such as valuation," requires the court to address underlying "legal conclusions" such as "the

appropriate valuation method," those "underlying legal conclusions" are reviewed "*de novo*." *Ibid.*

Nothing in *CSX* is to the contrary. *CSX* did not involve appellate review of the Tax Court's determination of estate taxes. *CSX* involved whether a State's assessment of railroad property violated the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). The 4-R Act prohibits States from "'[a]ssess[ing] rail transportation property at a value that has a higher ratio to the [property's] true market value . . . than the ratio' between the assessed and true market values of other commercial and industrial property in the same taxing jurisdiction." *CSX*, 128 S. Ct. at 470 (quoting 49 U.S.C. § 11501(b)(1)).

The question in *CSX* was whether a railroad alleging a violation of the 4-R Act is limited to challenging the "State's *application* of its valuation methods" or "whether a railroad may challenge the State's methods themselves." 128 S. Ct. at 469. Evaluating that question, this Court began with the proposition that "district courts must calculate the true market value of in-state railroad property" in order to determine whether the tax is discriminatory. *Id.* at 472. Conducting such a valuation would be impossible, the Court reasoned, "if [the district court] may not look behind the State's choice of valuation method." *Ibid.* "Given the extent to which the chosen methods can affect the determination of value, preventing courts from scrutinizing state valuation methodologies would render" the 4-R Act's prohibition on discriminatory valuations of railroad property an "empty command." *Id.* at 473.

The Court found a "total lack of textual support" in the 4-R Act for the argument that the Act drew a "distinction between [valuation] method and application" of that method, allowing challenges based on the former but not the latter. 128 S. Ct. at 472. The Court "decline[d] to

find distinctions in the statute where they do not exist," and enforced "the statute's directive making true market value a factual question to be determined by the district court." *Id.* at 473-474. The Court thus rejected the court of appeals' view that the 4-R Act does not permit a railroad to challenge the State's choice of valuation methodologies.

That ruling has no bearing here. The issue in *CSX* was not whether the choice of valuation methodology is an issue of law or an issue of fact, but whether the State's methodology could be challenged at all under the 4-R Act. The Court did not draw a distinction between issues of law and fact—much less hold that valuation methodology is an issue of fact—as that would have been irrelevant to its textual analysis.

CSX does state that "[v]aluation of property is * * * at bottom just an issue of fact about possible market prices, an issue district courts are used to addressing." 128 S. Ct. at 473 (citation omitted); see also *ibid.* (mentioning "the statute's directive making true market value a factual question"). But no one disputes that uncontroversial proposition, even in this very different context. The decision in this case specifically categorized "valuation" as "a question of fact." Pet. App. 7a. The question in this case, however, is whether the Tax Court's choice of *methodologies* to be used in deciding value is likewise an issue of fact—or instead an issue of law to be reviewed *de novo* in the courts of appeals. *Ibid.*; see pp. 9-10, *supra*; pp. 16-23, *infra*. *CSX* simply does not address that issue.[1]

---

[1] The Commissioner urges that *CSX* "also made clear that '[v]aluation of property,' *including the choice of valuation methodology*, 'is at bottom just an "issue of fact."'" Pet. 12 (citing 128 S. Ct. at 473) (emphasis added). As the Commissioner's placement of the quotation marks reveals, however, the phrase "including the choice of valuation methodology" is the Commissioner's gloss, not this Court's. *CSX* in fact has no bearing on the standard of review applicable to

And it certainly does not contradict the longstanding view of myriad courts that, consistent with *Powers*, questions of law such as the choice of methodology—even if they underlie an essentially factual determination—are reviewable *de novo*.[2]

To the extent *CSX* bears on this issue at all, it undercuts the Commissioner's view. The Court's decision there aimed to ensure searching review that extends to the methodology chosen by the initial valuator—a goal that is inconsistent with a deferential standard of review. For that reason, in *CSX* itself, the United States as *amicus curiae* advised the Court that a proceeding under the 4-R Act is not one "for deferential review of a state

---

choice of methodology. By contrast, this Court's decision in *Powers* does: It declares that "[t]he question of what criterion should be employed for determining * * * value" is "a question of law." *Powers*, 312 U.S. at 260. The Commissioner's effort to distinguish *Powers* is unavailing, as the Commissioner's own description of that case makes plain. That case, the Commissioner agrees, held that the calculation of value must include "the entire bundle of rights, not solely cash surrender value," and that the Board therefore "had committed *legal error*" in its selection of "a *valuation methodology*." Pet. 18 (emphasis added). Likewise here, the court of appeals held that the calculation of value must include the "entire" amount of unrealized capital gains tax liability, and that the Tax Court "had committed legal error" by selecting "a valuation methodology" that gives credit for only part.

[2] For that reason, the Commissioner errs in formulating the question presented as whether "determination of the fair market value of property for purposes of the federal estate tax, *including selection of the appropriate valuation methodology*, is a question of fact, reviewed for clear error." Pet. i (emphasis added). As the court of appeals explained, the ultimate question of fair market value may be one of fact, as the question presented suggests. But that does not mean that underlying legal determinations, such as the propriety of particular valuation methods, must be as well. *CSX* certainly does not so hold. And, as explained below, the uniform position of the courts of appeals is to the contrary.

appraiser's valuation, but rather a *de novo* action to vindicate a federal right * * *. It would be *inappropriate* in such an action for the federal court simply *to defer* to the State's valuation." No. 06-1287, U.S. Br. as *Amicus Curiae* 10 (emphasis added). If the United States were correct that *CSX* bears on the standard of review in this very different context, the United States' position in *CSX*—which advocated *de novo* review of valuation methodologies—would bear strongly on the proper standard as well.

B. This Court Should Not Remand to the Court of Appeals for Reconsideration in Light of Contentions It Has Considered and Rejected

Even apart from the fact that *CSX* does not address the question presented by the petition, there is ample reason to reject the Commissioner's request that the Court grant the petition, vacate the court of appeals' decision, and remand for reconsideration ("GVR") in light of *CSX*: The court of appeals has *already* had full opportunity to reconsider its decision in light of *CSX*. Following the court of appeals' issuance of its decision—and a month after this Court issued its decision in *CSX*—the Commissioner filed a petition for rehearing, presenting the very same arguments the Commissioner now presents to this Court.

The presentation could not have been clearer: The first question presented on rehearing was "[w]hether the panel's decision conflicts with *CSX* * * * in holding that the Tax Court's choice of valuation methodology was an issue of law subject to *de novo* review, rather than an issue of fact subject to review for clear error." C.A. Rehearing Pet. 1. That is, of course, the first question presented here and the Commissioner's primary basis for seeking a GVR from this Court. See Pet. 10 (urging the Court to GVR for the court of appeals to reconsider "whether the choice of valuation methodology is a legal or

factual question" in "light of *CSX*"). The court of appeals denied rehearing without recorded dissent. There is simply no basis for a remand for reconsideration where, as here, the court of appeals has already been apprised of the Commissioner's position and determined that reconsideration is not warranted.[3]

Finally, in the nearly 10 months since this Court decided *CSX*, no court of appeals has cited that decision to support clear-error review of the Tax Court's choice of valuation methodology. Nor has any commentator read *CSX* to alter the standard otherwise applicable to review of Tax Court decisions. That silence would be unthinkable if, as the Commissioner would have it, the decision effectively overruled case after case that, following this Court's decision in *Powers*, had held choice of methodology to be a question of law reviewed *de novo* on appeal. In any event, to the extent *CSX* is relevant, the courts of appeals will have ample time to consider it in the future and, if a circuit conflict arises, the Commissioner will have ample opportunity to seek this Court's review. Here, however, the court of appeals has already had the chance to reconsider its decision in light of *CSX*. Accordingly, there is no reason to grant the petition, vacate, and remand with directions to re-reconsider.

---

[3] To the extent the Commissioner relies on a purported inconsistency with Treasury Department regulations in seeking a GVR, Pet. 10, 13, 15-16, 18, that argument too was fully presented in the petition for rehearing. See C.A. Rehearing Pet. ii, 6-14 (urging that the panel's decision "conflicts with the requirements of Treas. Reg. § 20.2031(b) that 'all relevant facts and elements of value' must be considered in valuing property for estate tax purposes").

II. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE ON WHICH THERE IS CONFLICTING AUTHORITY

Although the Commissioner asks, in the alternative, for full merits briefing and argument, he concedes that "[p]lenary review by this Court may be premature at this time." Pet. 10, 24. That concession is correct. The Commissioner takes the position (incorrectly, in our view) that this Court's recently issued opinion in *CSX* changes the landscape on the standard of review applicable to questions of valuation methodology. The lower federal courts, however, have had little opportunity to assess and grapple with that position. To the extent some are persuaded and others are not, this Court will have the opportunity to resolve the resulting conflict—and to do so with the benefit of the lower courts' analysis and insight. Consistent with its position as a court of review and not first view, this Court should not intervene in the process before lower federal courts analyze, develop, and evaluate the effect of *CSX*, if any, on this area of law. Likewise, there is no reason for this Court to grant review of the second question presented by the petition—the proper method of accounting for unrealized capital gains taxes when determining the value of a closely-held corporation. The Commissioner does not even contend that there is a circuit conflict on that issue, and the Commissioner has an effective regulatory remedy that he may invoke to ensure clarity and consistency in this area.

A. There Is No Conflict on Whether the Methodology for Valuing Estate Assets Is a Question of Law or Fact

The Commissioner first claims that there is "an existing conflict" on the general question of "whether the choice of valuation methodology is an issue of fact or law." Pet. 19-21. The effort to establish that conflict, however, leads the Commissioner to frame the inquiry

sweepingly, citing cases far afield from the capital gains context, and even the estate-tax context. It also requires the Commissioner to state the question with sweeping generality, asking "[w]hether *determination of the fair market value* of property for purposes of the federal estate tax, including selection of the appropriate valuation methodology, is a question of fact." Pet. i (emphasis added). No one, however, disputes the first part of the Commissioner's question presented—that the ultimate question of market value is an issue of fact. The question here is only whether an underlying determination—the selection *of valuation methods*—is a question of fact or law. On that question too there is no conflict.

1. The cases cited by the Commissioner make that clear. The vast majority of them simply restate the uniform view that the ultimate determination of fair market value is an issue of fact while, consistent with this Court's decision in *Powers*, an underlying choice of "criteria" or "methodology" for conducting the valuation is an issue of law. As the Commissioner concedes, at least three courts of appeals have followed that analysis, holding that the choice of a valuation method is an issue of law. Pet. 19; see Pet. App. 7a ("The mathematical computation of fair market value is an issue of fact, but determination of the appropriate valuation method is an issue of law that we review *de novo*."); *Estate of Dunn* v. *Comm'r*, 301 F.3d 339, 348 (5th Cir. 2002) (same); *Amerada Hess Corp.* v. *Comm'r*, 517 F.2d 75, 82 (3d Cir. 1975) ("In choosing one method of valuation, the Tax Court set a legal standard, which is to be reviewed as such," but "the Tax Court's determination of value * * * is a finding of fact."). And the Federal Circuit has adopted that position as well. *Krapf* v. *United States*, 977 F. 2d 1454, 1458 (Fed. Cir. 1992) (explaining that "[t]he criteria by which a court determines the value of a charitable donation is an issue of law which we review *de novo*," but "[s]pecific factual

findings made in route to determining the value, as well as the value assigned to the donation itself, are reviewed under the clearly erroneous standard").

Notwithstanding the Commissioner's claim of "internal inconsisten[cy]," Pet. 20-21, it is clear that the First and Eighth Circuits have adopted that standard as well. Thus, in *Collins*, 216 F.2d at 522, the First Circuit observed that, although "[t]he question of fair market value for tax purposes is ever one of fact," the court must examine "the criterion which was employed by the Tax Court" and resolve "what is the proper criterion" as "a question of law." Likewise, in *Palmer* v. *Commissioner*, 523 F.2d 1308, 1310 (8th Cir. 1975), the Eighth Circuit observed that the Tax Court's fair market value determination "is ultimately a finding of fact," but that "the question of what criteria should be employed for determining value is one of law."[4]

The Commissioner claims that the Fourth, Sixth, and Ninth Circuits have held that the choice of valuation methodology is an issue of fact. Pet. 19. That assertion is incorrect. While the petition relies (at 19) on the Ninth

---

[4] The First Circuit's decision in *McMurray* v. *Commissioner*, 985 F.2d 36 (1993), is not to the contrary. It does not cite, much less purport to overrule, *Collins*. *McMurray* merely states the established principle that "[t]he tax court's ruling with respect to fair market value is a factual finding." *Id.* at 40. Although the court later concluded that there was "no clear error in the tax court's reliance on [the Commissioner's expert's] evaluation method," that statement was based upon the expert's reasonable selection of "comparative properties" as part of his valuation, the precise sort of predicate factual determination that is appropriately reviewed for clear error. *Id.* at 42 & n.8. Nor does the Eighth Circuit's decision in *Becker* v. *United States*, 968 F.2d 691 (1992), obscure that court's clear holding in *Palmer*, *supra*. The *Becker* court did not cite *Palmer*, and merely stated—in the course of affirming a jury verdict—the undisputed rule that "the ultimate question of [fair market] value is one of fact." 968 F.2d at 695 (citation omitted).

Circuit's decision in *Sammons* v. *Commissioner*, 838 F.2d 330 (9th Cir. 1988), that case holds that choice of methodology is an issue of law. In *Sammons*, the taxpayers argued that the Tax Court had erred in rejecting their appraisal of certain charitable donations and urged that the Tax Court valuation method was subject to *de novo* review. See *id.* at 334. The Ninth Circuit agreed that "'the subject of yardsticks for the evaluation of [property] * * * present[s] a question of law reviewable by this court.'" *Ibid.* (quoting *Zanuck* v. *Comm'r*, 149 F.2d 714, 718 (9th Cir. 1945)). But it found that the Tax Court had not rejected the taxpayers' appraisal on the improper basis they claimed. See *Sammons*, 838 F.2d at 334. Reviewing the remaining valuation evidence before the Tax Court, the Ninth Circuit concluded that the Tax Court did not clearly err in valuing the donated property at the taxpayers' cost at the time of purchase. *Ibid.* Thus, rather than broadly holding that selection of a valuation method is a question of fact, *Sammons* exemplifies the general rule that a Tax Court's ultimate valuation determination is a question of fact subject to clear error review, but that the proper "yardsticks" or methodology "for the evaluation * * * presents a question of law."

The Commissioner's reliance on *Estate of Godley* v. *Commissioner*, 286 F.3d 210 (4th Cir. 2002), is similarly misplaced. See Pet. 19. The question there was not selection of a valuation methodology. It was whether the decedent's 50 percent interest in several partnerships entitled his estate to a discount as a "minority" stake. 286 F.3d at 212, 214. The Fourth Circuit stated that "the question of whether to apply a minority discount is factual in nature" and noted that this view "is widely shared" among the courts of appeals. *Id.* at 215-216 (citing cases). The decision below in this very case reached the same conclusion. See Pet. App. 3a n.4 (holding that Tax Court did not "clearly err" in applying

10% lack-of-control discount). Thus, *Godley* stands for nothing more than the undisputed proposition—accepted by the court below—that the applicability of a minority discount is a question of fact for the Tax Court.

Nor does the Sixth Circuit's decision in *Gross* v. *Commissioner*, 272 F.3d 333 (6th Cir. 2001), evidence a circuit conflict. See Pet. 19. *Gross* concerned whether, in valuing gifts of corporate stock under the discounted-future-cash-flow approach, the Tax Court should have reduced a corporation's projected future income by deducting hypothetical corporate income taxes even though the corporation was an S corporation and therefore did not pay income taxes. 272 F.3d at 335, 337. The Sixth Circuit's articulation of the standard of review, far from creating a conflict, parallels the standards applied in this case. Like the decision below, the Sixth Circuit accepted the Commissioner's position that the ultimate "determination of 'fair market value' * * * is a question of fact" that could be reversed "only if it is clearly erroneous." *Id.* at 342. And like the decision below, it held that "whether the tax court used the correct standard to determine the fair market value is a legal issue." *Ibid.* (citing *Powers*, 312 U.S. at 260).

The Commissioner seems to rely on the fact that, on the particular facts before it, the Sixth Circuit applied a clear-error standard, finding that the dispute was not so much "over the proper criteria to be used in determining fair market value, but rather over whether those criteria were properly applied." *Gross*, 272 F.3d at 343. But that hardly creates a conflict. The choice of methodology is an issue of law. But that choice itself may be influenced by purely factual determinations that are reviewable for clear error. As the decision here explained, "the factual premises" underlying fair market valuation "are subject to a clearly erroneous standard." Pet. App. 7a. In *Gross*, the dispute over creating a hypothetical tax adjustment

for a Subchapter S corporation that in fact paid no taxes seemed to turn on such a factual premise—the likelihood the Subchapter S corporation would lose its non-taxable status. The dissent would have adjusted the corporation's value based on potential taxes because its "S Corporation status was not guaranteed." *Gross*, 272 F.3d at 346 (Clay, J., dissenting). By contrast, the majority rejected such a deduction because it saw no evidence in the record that the corporation might lose its tax-free status as a Subchapter S corporation. *Id.* at 354. The fact that factual premises are reviewed for clear error does not alter the fact that the choice of methodologies in light of those premises is, as *Gross* itself makes clear, "a legal issue" that is reviewed *de novo*.

In any event, those three cases address valuation in a variety of distinct contexts, such as the gift tax (*Gross*), charitable donations (*Sammons*), and estate taxes (*Godley*). They thus cannot be taken as establishing a broad circuit conflict on the standard of review applicable to choice of methodology "for purposes of the federal estate tax." Pet. i. And none of these cases establishes a circuit conflict over the proper standard of review when the Tax Court selects a methodology for assessing the effect of large, unrealized capital gains, which is the issue the court of appeals confronted here. Indeed, the Commissioner does not even assert a conflict on that issue. Applying *Powers*, *supra*, the Fifth Circuit in *Dunn* and the Eleventh Circuit below both determined that the valuation methodology for built-in capital gains liability is an issue of law. Pet. App. 6a-7a; *Dunn*, 301 F.3d at 348, 351. No court has held to the contrary. The lack of a conflict on the question presented here counsels strongly against review.

2. Perhaps because the governing legal principles are undisputed, the Commissioner urges that "the position of several other courts of appeals appear to be some-

what internally inconsistent." Pet. 20. To the extent the Commissioner is urging that there is an internal conflict within one or more circuits, that is a matter for those courts to resolve, not a matter for this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

In any event, any inconsistency is more apparent than real. For example, the Commissioner notes (Pet. 20) the Second Circuit's decision in *Saltzman* v. *Commissioner*, 131 F.3d 87, 93 (2d Cir. 1997), which holds that courts "review *de novo* the criteria used by the Tax Court in determining the value" of closely-held stock. That decision, the Commissioner declares, conflicts with *Silverman* v. *Commissioner*, 538 F.2d 927, 933 (2d Cir. 1976), which the Commissioner characterizes as reviewing a "valuation method under a substantial evidence standard." Pet. 20. But the cited portion of *Silverman* rejected the claim that the Tax Court, by choosing a methodology different from the ones presented by either party's expert, had "deprived [the taxpayers] of *due process of law*." 538 F.2d at 933 (emphasis added). The court of appeals held that the Tax Court was not limited to adopting one of the valuations presented by the parties and could reach its "own determination" based on the record. *Ibid.* The court found that due process was not violated in the case before it because the Tax Court's chosen methodology was supported by substantial evidence in the record, including evidence introduced by the taxpayer. *Ibid.* *Silverman*'s holding that due process allows the Tax Court to depart from the parties' proposed methodologies, so long as the record provides support for and thus notice of its alternative methodology, is neither in tension nor conflict with the later decision in *Saltzman*.

The Commissioner's claim of confusion in the First and Eighth Circuits is similarly without merit. See p. 17

& n.4, *supra*. Nor do the decisions of the Seventh and Tenth Circuits cited by the petition (at 19-20) create a conflict. As the Commissioner concedes, those cases do "not squarely addres[s] the issue" here. Pet. 19. And their application of the clear-error standard in their particular contexts is not inconsistent with the decision below.[5] Indeed, the vast majority of the cases cited by the Commissioner appear to have devoted little or no analysis to the proper standard of review, and the issue does not appear to have been disputed.

While the Commissioner relies on more than a dozen cases—many dating back more than three decades—not one of the cases acknowledges the alleged conflict the Commissioner purports to identify. Nor did the dissenting opinion below recognize or identify any claim of conflict. To the contrary, all of the panel members below accepted, like case after case before them, that the choice of valuation method is an issue of law. That, too, undermines the Commissioner's claim of a longstanding (or important) conflict on this issue.

Besides, even if some tension existed—and none does—the Commissioner now urges that this Court's

---

[5] In *Van Zelst* v. *Commissioner*, 100 F.3d 1259 (7th Cir. 1996), the court did not delineate standards of review, but simply concluded that the Tax Court's valuation was not clearly erroneous. The court did not purport to review the Tax Court's ultimate choice of valuation methods, but instead rejected the fanciful factual premises underlying the taxpayer's contention that the property was worth nearly 100 times what he paid for it. *Id.* at 1262-1263. *Heyen* v. *United States*, 945 F.2d 359 (10th Cir. 1991), merely recites that "valuation of stock is a question of fact" in the course of affirming a jury verdict on valuation. *Id.* at 364. In *Estate of Holl* v. *Commissioner*, 54 F.3d 648 (10th Cir. 1995), the court of appeals did not address the proper standard of review applicable to valuation methods, and reversed the Tax Court's approach as clearly erroneous only after finding that review "primarily involve[d] a factual inquiry." *Id.* at 650-651.

decision in *CSX* should be taken as resolving it. As the Commissioner concedes, however, "plenary review by this Court may be premature at this time" given that "[o]ther courts of appeals also have not had the opportunity to reconsider their approach in light of *CSX*." Pet. 24. There is no reason for this Court to address the impact of *CSX* before most courts of appeals have had a chance to consider it. And, given the absence of a circuit conflict, further review is unwarranted in any event.

3. This case, in any event, is not an appropriate vehicle for addressing whether choice of valuation method is an issue of fact or an issue of law because the standard of review would not have altered the outcome: The Commissioner's methodology was also incorrect under a clear-error standard. Instead of deducting the built-in capital gains tax liability on a dollar-for-dollar basis, as the net-asset-value method requires, the Tax Court predicted that the tax liability would be realized and payable over a 16-year period. Discounting those hypothesized payments to a present value of $21 million, the Tax Court deducted only that amount from the fair market value of CCC's assets.

But the Tax Court's present-value analysis rested on an erroneous assumption—that, over the 16-year period during which CCC allegedly would realize the built-in capital gains, the value of CCC's portfolio of stocks would not appreciate and no new unrealized capital gains would accrue. See Pet. App. 6a n.9, 27a. To the extent it is proper to extrapolate from the past to the future, the record shows that CCC's assets appreciated and accrued additional unrealized capital gains at least as quickly as CCC's existing capital gains were realized and paid off. *Id.* at 51a. Ignoring those liabilities in the valuation was clear error. The assumption of no new appreciation and no new corresponding capital gains tax liabilities, moreover, conflicts with the 13.2% rate of return that the Tax

Court determined a willing buyer would require from its investment in CCC. *Id.* at 65a, 70a-71a & n.13. Given the Tax Court's finding that CCC was well managed, the Tax Court's assumption of no new appreciation and earnings would logically lead CCC's management to liquidate its assets and reinvest the proceeds in a more profitable venture, thereby triggering a $51.6 million built-in capital gain tax liability.

The Tax Court's calculation thus rested on two clear errors. See *Estate of Jameson* v. *Comm'r*, 267 F.3d 366, 372 (5th Cir. 2001) (holding that Tax Court's internally inconsistent assumptions, that a hypothetical purchaser of a closely-held timber production company would engage in long-range timber production even though the company's annual rate of return was substantially lower than the purchaser's required return, represented clearly erroneous flaws in its valuation decision). The Tax Court, moreover, compounded those errors by failing to discount the "future" value of CCC's assets (based on its zero growth assumption) back to present value over the 16-year period. In other words, the Tax Court applied one valuation method to the capital gains tax liability and a different method to the underlying assets. Because the court of appeals' decision was correct regardless of the standard of review, this case does not present a suitable vehicle for resolving the question presented.

B. The Courts of Appeals Agree That Capital Gains Taxes on an Estate's Stock in a Closely-Held Corporation Must Be Discounted Dollar-for-Dollar on the Date of Death

The Commissioner also makes a passing request that this Court grant review to decide whether the court of appeals erred in holding that, for estate tax purposes, the net asset value of a closely-held corporation should be calculated by deducting unrealized capital gains liability dollar-for-dollar. Pet. i, 21-22. That exceedingly narrow

issue does not warrant review. Petitioner does not claim that there is a circuit conflict (instead alleging "tension" on this issue). Pet. 21. The courts of appeals that have actually resolved this issue are unanimous. And the Commissioner has it within his means, by reasonable regulation, to provide appropriate guidance on this issue and render this Court's review wholly unnecessary.

1. Only two courts of appeals have directly ruled on whether, for estate tax purposes, the Tax Court should calculate net asset value of a closely-held corporation by deducting the full amount of built-in capital gains liability. The Fifth Circuit's decision in *Dunn* was the "first * * * to emerge with a precise valuation approach as to the amount of the [capital gains tax] reduction." Pet. App. 30a.[6] The second was the decision below. Adopting *Dunn*'s requirement of a dollar-for-dollar discount, the decision below rejected "dicta" from two other courts of appeals suggesting some resistance to a discount of 100%. *Id.* at 18a-20a, 30a & n.43. Thus, the only two courts of appeals to have actually reached this issue are in accord.

The Commissioner nonetheless urges that the dicta rejected by the decision below is evidence of "tension." See Pet. 21-22 (citing *Eisenberg* v. *Comm'r*, 155 F.3d 50, 58-59 & n.15 (2d Cir. 1998), and *Estate of Welch* v.

---

[6] The Commissioner's suggestion that *Dunn* is distinguishable because it involved valuation of a majority interest, rather than a minority interest, is belied by *Dunn* itself. Pet. 21-22 n.7. The court recognized that the decedent's interest in the corporation was too small to force a liquidation of the corporation and further found that "the hypothetical willing buyer of the Decedent's block of stock would be unlikely to provoke liquidation of the company, even if he could." *Dunn*, 301 F.3d at 356. The court nonetheless held that a dollar-for-dollar discount for unrealized capital gains was required because the likelihood of liquidation is irrelevant in asset-based valuations. *Id.* at 354.

Comm'r, No. 98-2007, 2000 WL 263309, at *5-6 (6th Cir. Mar. 1, 2000) (208 F.3d 213 (Table)). But the decisions in both *Eisenberg* and *Welch* merely reversed the Tax Court's refusal to give *any* discount for unrealized capital gains tax liabilities, and *remanded* for determination of the proper amount of the discount. Neither squarely resolved the amount of that discount. Pet. App. 19a-20a. The fact that *Eisenberg* (in dictum in a footnote) and *Welch* (in dictum in an unpublished opinion) suggested that dollar-for-dollar discounts may be inappropriate in some circumstances hardly provides a basis for review in this Court. Neither of those cases required the Tax Court to adopt or reject any particular method for calculating the discount for built-in capital gains tax liability under an asset-based valuation. Pet. App. 19a-20a.

Both of those cases, moreover, predate the carefully considered opinions in *Dunn* and the court below. When the Second and Sixth Circuits have an opportunity to address the merits of particular methodologies for determining discounts for built-in capital gains, they may well side with the well-founded view of the Fifth and Eleventh Circuits. This Court should not grant review in anticipation of a purported conflict that may never develop.

2. The Commissioner also argues the merits of his preferred approach. But the only two courts to have squarely addressed the issue, both fairly recently, have rejected it. In any event, as the Commissioner's own brief makes clear, the most appropriate way to resolve this sort of technical tax issue is not by litigation but by regulation. See Pet. 13-14. "When a statute or regulation prescribes a specific methodology for calculating the value of property," the Commissioner urges, "courts must use that methodology." *Id.* at 14. Yet the Commissioner nowhere explains why issuance of a regulation "prescrib[ing] a specific methodology," or giving clearer guidance regarding the treatment of unrealized capital

gains liabilities in this context, would not fully resolve the technical tax issue the Commissioner asks the Court to resolve for him here. See *Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-983 (2005).[7] This Court should not invest scarce judicial resources reviewing a narrow issue of tax law on which the courts of appeals are unanimous before the government attempts to fix the purported problem by issuing an appropriate regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY A. LAMKEN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700

JOHN W. PORTER
Counsel of Record
AARON M. STREETT
AMY PHARR HEFLEY
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234

Counsel for Respondent

August 20, 2008

---

[7] Notwithstanding the Commissioner's protestations (Pet. 14-15), the directive to consider "[a]ll relevant facts and elements of value" now found in the relevant Treasury Department regulations, 26 C.F.R. § 20.2031-1(b), hardly resolves the issue. The decision below considered all the facts. The question is whether speculation about the future rate at which built-in capital gains will be realized over a 16-year period is "relevant" within the meaning of the regulation, particularly given the Tax Court's disregard of related facts that would affect the analysis. See pp. 23-24, *supra*.